



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 23, 1998

Ms. Linda Cloud
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR98-0234

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112405.

The Texas Lottery Commission (the "commission") received a request for a copy of any investigation conducted by or on behalf of the commission regarding the requestor. You have submitted the requested records to this office for review and contend that sections 552.101, 552.102, 552.108 and 552.111 of the Government Code except the information from required public disclosure.

You first argue that the requested information is confidential under section 552.101 of the Government Code in conjunction with section 466.023 of the Government Code. We conclude that section 466.023 of the Government Code provides the requestor with a right of access to information about himself in the investigatory file; thus, none of the other raised exceptions authorize the commission to withhold the information from the requestor. *See* Open Records Decision No. 613 (1993).

Pursuant to its authority under sections 467.036(b) and 466.201 of the Government Code, the commission is required to conduct background investigations on commission employees. We understand that the Texas Department of Public Safety ("DPS") conducts the necessary background investigations. *See* Gov't Code §466.203(a). Upon completion of the investigation, DPS submits its investigatory report to the commission, and the commission keeps its copy of the report in its investigatory file on the employee. *See* Gov't Code § 466.023(b).

The legislature added section 466.023 of the Government Code, the section about which you specifically inquire, in 1991. *See* Acts 1991, 72d Leg., ch. 6, § 2, at 205. Section 466.023 provides as follows:

(a) Except as otherwise provided by this chapter, all files, records, information, compilations, documents, photographs, reports, summaries, and reviews of information and related matters that are collected, retained, or compiled by the Department of Public Safety in the discharge of its duties under this chapter are confidential and are not subject to public disclosure. Each of these items is subject to discovery by a person that is the subject of the item.

(b) An investigation report or other document submitted by the Department of Public Safety to the commission becomes part of the investigative files of the commission and is subject to discovery by a person that is the subject of the investigation report or other document.

(c) Information that is in the form available to the public is not privileged or confidential under this section and is subject to public disclosure.

You ask whether the phrase "subject to discovery," as section 466.023 uses it, refers exclusively to the litigation context. If so, the subject of the background investigatory files could access the information only if the subject was involved in litigation. If, on the other hand, section 2.16 uses "discovery" in a broader sense, the subject would have a right of access to the information greater than the general public.

We were unable to locate any legislative history indicating the meaning that the legislature intended to assign to the phrase. We believe, however, because the phrase "subject to discovery" is included in a provision that explicitly makes the information confidential to the general public, the legislature intended to provide the subject of the investigation a greater right of access than the general public, not just in the litigation context, but at any time. In Open Records Decision No. 613 (1993), this office construed language in section 2.16 of V.T.C.S. article 179e, regarding investigations of applicants for racetrack licenses, which is virtually identical to section 466.023. We concluded that section 2.16 provided the subject of the investigation a greater right of access than the general public, not only in the litigation context.¹

The legislature enacted both section 2.16 of article 179e., V.T.C.S., and the predecessor to section 466.023 in 1991. See Acts 1991, 72d Leg., ch. 6, §2, at 205; ch. 386, § 5, at 1446. If we are to read section 466.023 of the Government Code consistently with the way we construed the language in section 2.16(b), we must conclude that the phrase

¹That conclusion was based in part on other statutory language in section 2.15 of article 179e which provides the subject of the investigation with the power to consent to the disclosure of investigatory files held by the Racing Commission. The subject's power to consent to release of the commission's investigatory file implicitly provides the subject a right of access to the file under section 2.15. See *Hutchins v. Texas Rehabilitation Comm'n*, 544 S.W.2d 802, 804 (Tex. Civ. App.--Austin 1976, no writ). Section 2.15 does not limit the subject's right of access to a litigation context.

"subject to discovery," in section 466.023 means that the subject of the investigatory report has a right of access to the commission's copy of the report not solely in the context of litigation, but at any time. *See* Attorney General Opinion V-723 (1948) at 6 (stating that, in statutory construction, inconsistencies are to be avoided if possible). Thus, the subject of an investigation has a right of access under section 466.023 of the Government Code to information in the commission's file that pertains to the subject.

We have examined the investigatory report that you have submitted for our review. The report consists of a background investigation regarding the requestor. Because section 466.023(b) expressly provides the requestor with a right to information about himself, none of the other exceptions to disclosure you have raised can overcome that right. *See* Open Records Decision No. 613 (1993).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Loretta DeHay", written in a cursive style.

Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: 112405

Enclosures: Submitted documents

cc: Mr. Marc Garcia
P.O. Box 26281
Austin, Texas 78755
(w/o enclosures)

Mr. Philip Durst
Wiseman, Durst, Tuddenham & Owen
1004 West Avenue
Austin, Texas 78701-2019
(w/o enclosures)